INDEX.

	Page
Authorities Cited	i
Motion for Leave to File Petition for Rehearing	1
Petition For Rehearing	3

AUTHORITIES CITED.

Cases.

Commissioner of Internal Revenue v. Glenshaw Glass Company, U. S. Supreme Court, Oct. Term, 1954, No. 199	2, 5, 6
Commissioner of Internal Revenue v. William Goldman Theatres, Inc., U. S. Supreme Court, Oct. Term, 1954, No. 199	2, 5-6
Doyle v. Mitchell Bros. Co., 247 U. S. 179	7
Durkee v. Commissioner (CCA 6, 1947), 10 TCM 1083	5
Eisner v. Macomber, 252 U. S. 189	6, 7
Keasbey & Mattison Co. v. Rothensies (CCA 3), 133 F. 2d 894	6
Levens, Anna, v. Commissioner, 10 T. C. M. 1083	5
Stratton's Independence, Ltd., v. Howbert, 231 U. S. 399	7
Veazie Bank v. Fenno, 8 Wall. 533, 542	7
Wilson v. Commissioner, 7 T. C. 1469	7

Miscellaneous.

Internal Revenue Code, 1954, Sec. 901	6
IT 2964 XV-1 CB 138 (1936)	6
IT 3371, 1940-1 CB 103	6
IT 3924, 1948-2 CB 91	6
IT 4013, 1950-1 CB 65	6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 478.

OBEAR-NESTER GLASS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Comes now the petitioner in the above-entitled cause, by its counsel, and respectfully prays for leave to file Motion for Rehearing of its Petition for Writ of Certiorari heretofore on December 13, 1954, filed in this Court. In support of said motion, petitioner shows the Court that:

1. On December 13, 1954, the petitioner filed in this Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

2. At the time said petition was filed, this Court had already issued its Writ of Certiorari to the United States Court of Appeals for the Third Circuit in the cases of **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of Internal Revenue v. William Goldman Theatres, Inc.** Said cases involve the same issue of law as is involved in the above-entitled case, and respondent

did not oppose the granting of the Petition for Certiorari in this case.

3. Thereafter, on March 28, 1955, this Court reversed the judgment of the Court of Appeals for the Third Circuit in said cases.

4. Thereafter, on April 4, 1955, this Court denied petitioner's Petition for Certiorari. Petitioner believes that the Court's denial of its Petition for Certiorari was solely in reliance upon and upon authority of the Court's decision in said cases of **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of Internal Revenue v. William Goldman Theatres, Inc.**

5. Thereafter, on April 10, 1955, Respondents to said cases, Glenshaw Glass Company and William Goldman Theatres, Inc., filed with this Court their Petition for Rehearing of the said decision of this Court, and said Petition for Rehearing was denied on May 9, 1955.

6. The Petition for Certiorari of petitioner ought to be reconsidered for the reasons stated in Petition for Rehearing submitted herewith.

7. Said cases of **Glenshaw Glass Company** and **William Goldman Theatres, Inc.**, were not finally determined until May 9, 1955, and petitioner proceeds promptly thereafter to make this motion.

Wherefore, petitioner respectfully prays that this Honorable Court grant this motion for leave to file Petition for Rehearing and accept the Petition for Rehearing submitted herewith.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 478.

OBEAR-NESTER GLASS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

Comes now petitioner, Obear-Nester Glass Co., by its counsel, and respectfully petitions for a rehearing of the decision and judgment of this Court entered April 11, 1955, denying petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The grounds urged by petitioner in support of this petition are as follows:

I.

The Court's denial of the writ of certiorari is based solely upon its decision in **Commissioner of Internal Revenue, Petitioner, v. Glenshaw Glass Company, Respondent,** and **Commissioner of Internal Revenue, Petitioner, v. William Goldman Theatres, Inc., Respondent.**

II.

In denying petitioner's petition for the writ of certiorari, the Court passed upon the merits of the case, which ought not to be considered on such a petition. At the time the petition was filed, unimpeachable grounds for the granting of the writ admittedly existed, and the writ should have been granted. In denying the writ, solely upon the basis of a subsequent decision relating to the merits of the case, and not relating to the allegations of the petition for writ of certiorari, the Court determined petitioner's case without hearing petitioner, and deprived petitioner of its right to be heard in its own case which was determined. In case of two conflicting decisions of the Court of Appeals, the writ of certiorari should issue in both cases, and the Court ought not first determine the merits and then deny the writ to the Court which it deems to have rendered a correct decision. That a decision is correct is not and ought not to be a ground for denying certiorari, if it is in conflict with the decision of the Court of Appeals of another Circuit.

The result of the denial of petitioner's petition for certiorari is that the concessions of others are taken as petitioner's concessions. Petitioner, while it concedes that an excise or franchise tax could constitutionally be imposed upon gross receipts of a corporation, including punitive damages, has not conceded that an income tax can be made to include such damages in its measure. The Court's decision makes no distinction between punitive damages received by a corporation and those received by an individual, and apparently none is to be made; but a tax upon an individual as such is a **capitation** or **poll tax**, a direct tax, and such a federal tax must be measured by income. There is, therefore, a constitutional question involved in the determination whether punitive damages are income, although there is no question that Congress could

include in the measure of a corporate franchise tax any receipt or other thing, whether or not income.

Similarly the concession that recoveries are taxable income to the extent that they compensate for damages actually incurred is the concession of others, not of this petitioner, who has not so conceded, but has only omitted to appeal from the decision of the Tax Court to that effect. The materiality of the concession first appeared in the Court's opinion, and the question (for there is a question) whether or not such actual damages are taxable income has never been argued to the Court, and ought not be thus decided without consideration. **Durkee v. Commissioner** (CCA 6, 1947), 162 F. 2d 184; **Anna Levens v. Commissioner** (Tax Court Memo Opinion, Docket No. 27283, Nov. 8, 1951), 10 TCM 1083.

The denial of the writ was therefore contrary to this Court's expressed practice, to grant the writ "where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." Rule 38, par. 5 (b). While it is recognized that the rule quoted does not control the Court's discretion, that discretion ought not be exercised to deny a writ in case of conflict among the circuits, to refuse to a petitioner the right to be heard in his own case.

III.

Respondent, Commissioner of Internal Revenue, did not oppose the granting of the writ in the above-entitled cause. That both parties thought the writ should issue is convincing reason for the issuance of the writ.

IV.

The decision of the Court in **Commissioner of Internal Revenue v. Glenshaw Glass Company** and **Commissioner of**

Internal Revenue v. William Goldman Theatres, Inc., and its denial of petitioner's Petition for Certiorari, omitted considerations of grave importance in the interpretation and enforcement of the revenue laws, including those set out in this petitioner's Supplement to its Petiton for Certiorari heretofore filed with this Court, and the decision of the Court contains implications not intended by Congress nor foreseen by this Court.

The question presented in this case and the related cases is the meaning of the word "income," as that word is used in the Internal Revenue Code, and the basis of the Court's decision is that all receipts constitutionally taxable are taxable as income. This holding is contrary to the consistent and unquestioned position not only of petitioner, but of respondent over a period of many years, as appears from related practice and rulings.

For instance: Section 901 of the Internal Revenue Code of 1954 allows a credit against United States income tax, of income tax paid to a foreign country, but a tax other than an income tax paid to a foreign country is allowable only as a deduction from income. Thus, the question frequently arises whether a foreign tax imposed by statutes or decrees written in a foreign language is an income tax. In determining whether such a tax, not imposed on income by that word which is unknown in the foreign language, is an income tax, the decision has consistently been reached upon the basis of whether or not the tax is upon income, and the definition of income set out by this Court in **Eisner v. Macomber**, 252 U. S. 189, has been used as the basis of determining whether or not the subject of the particular foreign tax is income. IT 2964, XV-1 CB 138 (1936) cites **Eisner v. Macomber** as the basis of its ruling. See also IT 3924, 1948-2 CB 91; IT 4013, 1950-1 CB 65, IT 3371, 1940-1 CB 103; **Keasbey & Mattison Co. v. Rothensies** (1943), CCA 3, 133 F. 2d 894, Cert. den. 320 U. S.

739. In **Wilson v. Commissioner**, 7 TC 1469 (1946), the Tax Court upheld the Commissioner's assertion that a tax which included in its measure property received by gift was not an income tax.

There have been negotiated recently, and there are now in process of negotiation, numerous treaties with foreign countries relating to taxation, and substantially all of them relate in part at least to taxation of incomes. Their provisions are based upon the accepted concept of income and become uncertain, ambiguous or meaningless when the accepted concept of income is abandoned. The decision of this Court in the related cases heerinafter mentioned, if it be the law, would require reconsideration of the treaties heretofore ratified and revision of the negotiations now being conducted.

V.

The Court in its decision distinguishes **Eisner v. Macomber**, 252 U. S. 189; **Stratton's Independence, Ltd., v. Howbert**, 231 U. S. 399, and **Doyle v. Mitchell Bros. Co.**, 247 U. S. 179, upon a basis which is untenable. It states that the definition of income adopted in **Eisner v. Macomber**, and since then followed, derives from the earlier cases. In truth and in fact, it derives from "the great work of Adam Smith, the first comprehensive treatise on political economy in the English language." (See **Veazie Bank v. Fenno**, 8 Wall. 533, 542, decided in 1869, in the period of the beginning of income taxation in the United States.) Adam Smith's concept of **annual wealth**, that is, income, is the concept of income upon which the income tax laws are based and from which the concept of income derives. The cases cited by the Court (**Eisner v. Macomber, Stratton's Independence, Ltd., v. Howbert**, and **Doyle v. Mitchell Bros.**) are but applications of Adam Smith's generalization of income as, first, gain; second, derived, and third, from a source (as capital and labor).

Wherefore, petitioner respectfully prays that a rehearing be granted, and that upon such rehearing its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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